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Supreme Court of the United States

OCTOBER TERM, 1928.

NO. 106.

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE STATE OF MINNESOTA.

In Error to the Supreme Court of the State of Minnesota.
Filed April 9, 1928.

NO. 107.

GREAT NORTHERN RAILWAY COMPANY,
Appellant,

vs.

THE STATE OF MINNESOTA.

Appeal from the Supreme Court of the State of Minnesota.
Filed April 9, 1928.

REPLY BRIEF
OF PLAINTIFF IN ERROR AND APPELLANT.

F. G. DORETY.
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Dated January 2, 1929.

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REPLY BRIEF OF PLAINTIFF IN ERROR AND APPELLANT.

The position of appellant and plaintiff in error in this case is that the evidence clearly shows that far more than a mileage

prorate of the value of the plant used in producing the total ore earnings is located in Wisconsin; that far more than a mileage prorate of the total effort and total operating cost is expended in Wisconsin; that the mixing and grading of the ore which is a process entirely independent of transportation is performed entirely in Wisconsin; and that therefore much more than a mileage prorate of the total charge is fairly attributable to Wisconsin, and very much less than a mileage prorate is fairly attributable to Minnesota. Therefore, we say that a Minnesota tax on a mileage prorate of the total charge is a direct tax on earnings accruing in Wisconsin, and that it is a burden on interstate commerce and a taking of property without due process of law. The gist of the argument is that because of the great amount of physical plant required and used in Wisconsin, and because of the greater effort and operating cost expended there, a proportionately greater part of the earnings is fairly attributable to Wisconsin. The argument rests on the assumption that the proportion of interstate earnings fairly attributable to any part of the line depends upon the value or investment in that part of the line and upon the effort and operating cost expended there.

We desire to take up in turn the arguments offered on behalf of the state in reply to this contention.

That Earnings are More Susceptible to a Mileage Prorate, Than is Physical Value.

On pages 28 to 33 of the state's brief, counsel argues that the Minnesota statute does not tax any property or value outside the state because it does not tax any property or value at all, but simply taxes earnings. They contend that earnings do not vary with cost or value of plant and cannot be definitely

and scientifically allocated between different portions of the road in proportion to the cost or value of each portion, but that there is a greater latitude in the allocation of earnings, and that a mileage prorate is a reasonable method of allocating them, and is, therefore, within the legislative discretion.

If the earnings are just sufficient to pay operating expenses plus a fair return upon total investment, it seems obvious that any apportionment of earnings must be made in proportion to investment, as otherwise the investment in one state might be left without a fair return. But counsel would probably argue that if the property has an investment value of only fifteen million dollars but should earn excessive net profits of say six million dollars per year or enough to pay a return on a value of a hundred million dollars, it could not then be definitely stated that the proportion of the investment in each state, which is relatively small, would necessarily control the apportionment of the earnings, which are relatively large, but that the earnings, or at least that portion of them in excess of the return on investment, might be allocated in proportion to service rendered and that miles of track are a fair method of apportioning service.

One answer to this argument is that there is no evidence in this case that the net profits from ore service exceed a return on the investment. Counsel point to the fact that 25% of the gross receipts of the Great Northern are earned upon this ore trackage which constitutes only 4% of the trackage in the state. This would indicate a heavy traffic density on the ore line, but it does not necessarily indicate large profits, because the rates may be correspondingly low so that the return per mile in net profits may be no greater than upon any other part of the system.

But even if we assume that there are large net profits derived from the ore service in excess of a return on the investment, and even if it were proper to allocate this excess upon a mileage basis, it would still remain true that at least enough of the profits to pay a return on the investment should be allocated in proportion to investment. In this case, Minnesota is not only taxing 81% of the excess profits if there are any, but she is also taxing 81% of that portion of the profits which should be regarded merely as interest on the investment. She is leaving for Wisconsin, an insufficient part of the earnings to pay a bare return upon the Wisconsin investment. Even if Counsel's argument were sound, and even if there were evidence of excess profits from the ore traffic, it would not justify a mileage prorate of the entire gross receipts from ore traffic.

But the argument in support of a mileage prorate of excess earnings is not sound. A mileage prorate of earnings may *seem* to be fair because track mileage *seems* to be a fair method of measuring and prorating service rendered. But this seeming fairness has no other basis than the general assumption that one mile of track contains as much physical property as another. The service of transportation consists in overcoming inertia and resistance. The commodity must be moved through a certain amount of space, up and down certain elevations and across rivers and other obstacles. The amount of service performed can only be measured by the amount of resistance overcome. One mile of space may be equal to another, but more service is performed in moving traffic up a mile of expensive mountain grade, across a costly river bridge, or through a tunnel piercing the heart of a mountain barrier than is performed in moving the same traffic across a mile of level country. More service is performed in rendering a mile of dock service which requires 76 tracks, costly steel and concrete ele-

vated structures, large operating expenses and considerable periods of time, than is performed in the three or four minutes which is required to haul one car in a large trainload over a mile of single track. The amount of resistance which is overcome, and, therefore, the amount of service which is performed, is reflected first in the amount and extent of the physical plant which is required to overcome it, and second, in the amount of labor and operating cost which is expended.

In ordinary railroad transportation these will average up about the same per mile of road, and, therefore, a mileage prorate *seems* to be a fair method of apportioning earnings just as it seems to be a fair method of apportioning physical value. But in this case, it appears that forty or fifty times as much money was expended in creating that part of the physical plant included in the dock property as was expended in creating an average mile of track in Minnesota. This means that the mile of dock property contains forty or fifty times as much physical plant, (because relative cost is an accurate measure of the relative amount of physical property) and that it is, therefore, contributing forty or fifty times as much service as any mile in Minnesota.

The total earnings, including excess profits if any, accruing in two states, cannot be fairly apportioned between them except upon the basis of the relative service performed in each state. One unit of service is entitled to as large a share of the profits as is any other equal unit of service. Track mileage is a fair basis for apportioning earnings only to the extent that it may be regarded prima facie as measuring the amount of physical plant, and, therefore, the amount of service performed. When it is shown in a particular case, by the undisputed evidence, that track mileage does not afford an accurate measure of physical property or of service performed, it is entitled to

no greater weight in apportioning earnings, than it is in apportioning a physical valuation. The application of a mileage prorate to a railroad on which the amount of physical property and the amount of service performed on a single mile outside the state is forty or fifty times as great as on a single mile inside the state, becomes meaningless and illogical, and, therefore, entirely arbitrary.

Counsel argues that such cases as *Fargo v. Hart*, 193 U. S. 490, and *Wallace v. Hines*, 253 U. S. 66, are not applicable here because they deal with apportionments of value and not apportionments of earnings. But we submit that earnings accruing in Wisconsin are just as much protected by the Constitution as property located in Wisconsin. The same Constitutional principles which prevent Minnesota from taxing the latter also preclude her taxing the former.

Greater "Use Value" in Minnesota.

Counsel for the state next contend that even though our evidence correctly and conclusively shows a disproportionate amount of investment or cost of plant in Wisconsin, nevertheless cost does not determine value, and the portion of the plant in Minnesota, although less costly per mile may be equally valuable or more valuable per mile. This argument is based upon the assertion, on page 27 of the state's brief, that the Great Northern Railway Company controlled the ore traffic through ownership of iron mines. This being so, counsel argue that the control of the traffic inhered in and was a part of the value of the Minnesota trackage. If the Great Northern had not owned its own docks, it could have shopped about among independent dock companies and secured a low dock charge that would barely pay interest upon the cost of the dock, and

it could thus have retained for the lines in Minnesota the benefit of all of the profits in the ore traffic, above actual cost of handling and interest on the investment. Therefore, this "use value" which represents the profit from ore traffic, over and above these costs, should be attributed to the Minnesota trackage and is taxable in Minnesota.

By the same reasoning, if the Great Northern had owned the Wisconsin docks but not the intervening trackage, it could have shopped about among the different railroad lines in Minnesota to secure the cheapest possible rail haul, and it could thus have added to the Wisconsin dock property the entire "use value" of the ore traffic. The argument works both ways.

The fact is, of course, that in order to realize any profit whatever from the ore traffic, the entire plant is necessary, including the trackage in Minnesota and the dock in Wisconsin. The "use value" inheres no more in one part than in the other. The ownership of the mines is in the Company and the "use value" inheres in the entire property. It cannot be arbitrarily claimed by nor attributed to either state. The only fair way to apportion it is to divide it in proportion to the physical property, attributing to each equal item of physical plant, an equal share of the "use value."

The same reasoning would be true of grain originating in Montana or lumber originating in Washington. In order to realize any profit from transporting these commodities, trackage is required through many states. The amount of the traffic and its routing depends quite as much upon the market demand at the destination as it does upon the supply at the source. The traffic could not move at all unless there were commodities at one point and a demand for them at another point, and unless all parts of the trackage in all of the states were provided. It would be entirely arbitrary for any state

to claim a greater "use value" for its mileage because it originates the traffic. It would be just as consistent for the destination state to claim a greater share of the "use value" because it provides the market, without which the traffic would not move.

The ownership of the mines by the Great Northern Railway Company is not an incident of the Minnesota trackage, any more than it is an incident of the Wisconsin docks. If this mine ownership can be used by the Company to add value to the Minnesota trackage, it can likewise be used to add value to the Wisconsin dock, and it was in fact so used. When counsel for the state contend that the Dock Company received an exorbitant division, they are in effect contending that the Great Northern was actually using its mine ownership to add value to the Wisconsin docks rather than to the Minnesota trackage. We submit that if the entire ore property had any value in excess of investment, the excess value must be added to the Wisconsin dock investment just as much as to the Minnesota trackage investment, and that a prorate between the states based upon investment in the physical property will measure the "use value" in each state just as truly as it will measure the items of physical property in each state. A mileage prorate to Minnesota is, therefore, just as arbitrary and unconstitutional when applied to this "use value", if there is one, as it is when applied to the physical property, since the mileage prorate is far in excess of the investment prorate, and therefore of the value prorate

TOTAL TAX LEVIED DOES NOT EXCEED A FAIR AD VALOREM TAX.

Counsel seek to establish from reports of the Minnesota Tax Commission, that if the average rate of levy in Minnesota, or in the counties where these tracks are located, were applied ad valorem to the value of the property as measured by its investment, the resulting ad valorem tax would be larger than the total tax accruing to Minnesota under the gross earnings tax statute, and that therefore the total tax claimed here is not unfair. This argument is improper in the first place because this court does not take judicial notice of reports of state officers such as the Minnesota Tax Commission. *First National Bank of Wellington v. Chapman*, 173 U. S. 205 at 217.

But even assuming that these reports were properly before the court, and that it were established in the record that the state might properly have assessed ad valorem taxes larger in amount than the total taxes which she claims under the gross earnings tax statute, that fact would not justify her in taxing earnings accruing in Wisconsin. The same argument might be carried to exreme lengths. It might justify the state in taxing 100% of the ore earnings, instead of only 81%. It would equally justify her in taxing revenue on transportation carried on entirely in the state of Wisconsin and never touching Minnesota, or in taxing a line of railroad located entirely in Wisconsin.

The decision in this case cannot turn upon the question whether a larger total ad valorem tax might properly have been levied. It must turn on other portions of the argument. If the other portions of our argument have failed to establish the fact that the attempted tax is in fact a tax upon Wisconsin earn-

ings, then our case must fail. On the other hand, if we have established the fact that the state is here attempting to tax Wisconsin earnings, the tax is just as illegal as though it had been assessed in a case where the entire service and the entire property were located in Wisconsin.

Counsl for the state cite decisions of this court on pages 33 to 36 of their brief from which they draw the conclusion that our case must fail unless accompanied by proof that the total tax claimed is excessive in amount as compared with taxes imposed upon other property within the state. But none of the cases cited involves any question of allocation between states. None of them involves any question as to whether one state is taxing property or earnings in another state. The only question involved was whether a gross earnings tax as such could be sustained in lieu of a property tax. Upon this question, this court declared that the gross earnings tax was proper so long as it did not impose an amount in excess of what might properly be levied by other methods. But the court never declared that one state could tax property or earnings in another state merely because the total amount of tax levied was no larger than might properly have been levied by other means upon property within the state. Even if Minnesota were to exempt us entirely from taxation on Minnesota property, this would give her no right to tax property in Wisconsin or other states.

Character of the Evidence and Findings.

Counsel for the state contend that the character of the evidence showing a greater proportion of the cost of plant in Wisconsin is unsatisfactory because it does not cover the earlier years, and because the evidence that was submitted in this

case was evidence that had been collected at some prior time for another purpose, and because no findings were based upon this evidence by the trial court.

We submit that if the evidence is sufficient to prove an over-assessment in any one year or in any group of years, the judgment, which is for a lump sum covering 12 years, must be reversed. If the assessment for any year is too large, the total is too large. It is immaterial that the evidence does not cover the earlier years, and it is entirely immaterial whether the information was collected for the first time for use in this case, or whether it had already been collected for some other purpose. The facts themselves are not controverted.

As to the fact that the lower court did not make findings on this subject, that objection is one which could be considered only by the state supreme court. The state court undertook to and it did decide the Constitutional question upon the evidence, without requiring findings by the lower court and we submit that the only question before this court is the question whether that evidence requires a reversal of the decision.

Counsel for the state contend that the mixing and grading of the ore must be considered a part of the transportation and not an independent manufacturing process, because the supreme court of the state in its opinion stated that the dock service was incidental to transportation (state's brief page 12). This is a conclusion reached by the state court from the evidence. If the evidence and the facts clearly establish unconstitutionality, a declaration by the state supreme court contrary to the evidence will not sustain constitutionality. If a carload of potatoes of all sizes from large to small were shipped, and if the railway company should establish a plant for sorting, grading and sacking them according to size, and should actually perform this service, no finding by a state

supreme court could make this service a part of transportation. The fact that it might be "absorbed in the tariff" and covered by a single charge would not permit Minnesota to tax the earnings from such a service outside the state, and no finding by the state court that the service was a part of the transportation could alter the fact. The grading and sorting of ore is in fact just as independent of transportation as would be the grading and sorting of potatoes.

Exorbitant Dock Company Division.

Counsel contend that the division paid to the Dock Company was "exorbitantly high," because the Dock Company paid dividends of eleven million dollars in 12 years on a five million dollar investment or an average of a million dollars a year, which is approximately twenty per cent per year.

In 1912, approximately fourteen million tons of ore were handled. This amount is determined by dividing the total payments to the Dock Company (R. 5) by 15 cents which was the amount of the division at that time. Dividends of a million dollars on fourteen million tons amount to approximately 7 cents per ton. If the dividend were reduced to six or seven per cent, the profit per ton instead of being seven cents would be two or three cents, and the alleged excess would be four or five cents per ton. In other words, counsel's argument amounts to a contention that the division in that year should have been ten or eleven cents instead of fifteen cents.

Assuming that this reasoning were sound, it still leaves ten cents per ton which the state is wrongfully attempting to tax. If the amount paid to the Dock Company is exorbitant, let the state determine upon an amount that is proper and fair and deduct that. What we are contending is that the state

cannot tax the entire charge including what is fairly attributable to the dock service. She must make some deduction. If she is unwilling to accept our division, let her make one of her own.

Unity of the Gross Earnings Tax.

On pages 18 to 21 of the state's brief, counsel contend that the gross earnings tax is a single unit which cannot be divided into its separate items or separately attacked, and that the statute cannot be held invalid as to a portion of the company's revenue and sustained as to the balance. It is said that the entire tax for the year must stand or fall as a single assessment.

We submit that the issue thus raised is not before this court. The sole issue here is whether the state is entitled to a judgment in this action for the particular tax which we allege to be assessed on Wisconsin dock earnings. Whether this statute is valid or invalid as to the other items of earnings on other parts of the system is a question which can be decided when the issue is raised.

If the issue were raised, we believe that it would have to be decided against the contention of the state. Where a statute is susceptible to two constructions only one of which is in accordance with Constitutional requirements, the latter construction should be adopted. The statute applies in terms to the earnings of railway companies operating partly or wholly in Minnesota. It does not apply in terms to earnings of their subsidiary companies operating exclusively in Wisconsin. It applies in terms to business which is done over mileage, and is impliedly confined to earnings from railroad business. It does not expressly levy a tax upon earnings from the grading and storage of ore or from dock service. We are not attacking

the express wording of the statute but simply the construction of it which has been adopted by the state supreme court.

Moreover, even if these were strictly railroad earnings, and even if they were earnings of the Great Northern Railway Company and not of its subsidiary, so that the statute were specifically applicable to them, the mere fact that its application to these particular earnings would be unconstitutional would not render it unconstitutional as a whole. The tax is in fact a separate assessment against each item of earnings. See *Philadelphia S. S. Co. v. Pennsylvania*, 122 U. S. 326, from which we have quoted on pages 42 and 43 of our original brief. It is true that the railway company reports its earnings to the state as a unit, but the law requires the railway company to compute them item by item, apportioning each item of interstate revenue in proportion to the mileage involved in that particular item. We see no reason why the statute cannot be sustained in all cases and as to all items where the presumption of mileage uniformity is not overthrown. The method prescribed by the statute is a proper method, and it remains so until the attempt is made to apply it to earnings which are shown to belong outside the state. That application must fail, but there is no reason why the tax should not be sustained in all other cases.

Counsel do not expressly argue in this brief, as they have in previous briefs, that the alleged "unity" of the gross earnings tax is such as to require proof that the mileage prorate for the system as a whole is unduly favorable to Minnesota. We had anticipated that argument and replied to it on pages 41 to 56 of our original brief, and there seems to be no occasion for adding to or enlarging upon that argument here.

It is argued briefly on pages 19 and 20 of the state's brief that the gross earnings tax is in effect a legislative assessment

resting upon the legislative determination that a tax so computed will impose only a fair burden upon the property of the company, equivalent to that which would result from an ad valorem levy, and that there is involved in this determination the assumption that each railway company will have appropriate terminals both inside and outside of the state which contribute to its earnings. In reply to this we submit that it would not be "due process" for the Legislature to fix an ad valorem tax, with reference, not to the value of the property in the state nor to earnings in the state, but to earnings accruing outside the state. A legislative determination of an ad valorem tax cannot be wholly arbitrary, and it would be wholly arbitrary if based upon earnings accruing to the company from outside the state. We believe that the legislative determination can stand to the extent that it is based upon earnings within the state, and that the balance of the assessment must fall. The question here is whether it must fall in part. Whether the balance of the assessment must also fall is a question that is not before this court.

Counsel do not expressly argue here that terminals inside the state tend to offset the terminals outside the state, such as the Wisconsin dock terminals. They have made this argument at some length in previous briefs and our reply is set forth quite extensively on pages 41 to 52, inclusive, of our original brief, which we have already referred to. There is nothing here to call for a repitition of that argument. The ore line is practically a separate railroad and a large one. Its earnings constitute 25% of all the interstate earnings of the Great Northern Railway Company taxable by Minnesota. The docks in Wisconsin as well as the originating terminals in Minnesota are used exclusively by ore traffic and every pound of ore that uses one also uses the other. The application of the

gross earnings tax to the ore earnings is a problem which must be considered independently of its application to the balance of the traffic and the remainder of the system. We submit that as applied to the ore earnings the statute is clearly invalid when construed, as the state court construed it, as calling for the taxation in Minnesota of earnings fairly attributable to service performed in Wisconsin.

Our Suppositious Cases.

a. *A two-mile tunnel in Wisconsin.*

On page 29 of our original brief, we state that much of the argument which we had previously been making would apply if the excess value outside of the state inhered in a five million dollar tunnel or a five million dollar bridge. On page 43 of the state's brief, counsel use this illustration to argue that Minnesota's mileage proportion, and, therefore, Minnesota's tax would be the same, whether the small amount of mileage outside of the state consisted of an expensive tunnel or of ordinary trackage. Counsel argue that since Minnesota's tax would remain the same in either case, this indicates that the mileage prorate is a correct basis. The fallacy in this reasoning is that counsel overlook the fact that if the small amount of mileage in Wisconsin included a five million dollar tunnel, an equitable total rate would have to be higher in order to pay a return on the additional investment. Where there was no tunnel, Minnesota would be taxing 98% of a lower charge. Where there was a valuable tunnel in Wisconsin she would be taxing 98% of a higher charge. Her total tax upon Minnesota property would, therefore, vary according to whether or not the railway company owned a valuable tunnel outside the state.

b. *An independent Dock Company.*

Counsel do not reply to this illustration, but offer instead a supposition that if the Great Northern connected with an independent company at the state line, it would probably obtain a division of more than 81.55% of the total charge. This is because the Great Northern is said to own the iron mines, and therefore, to control the traffic. But on the other hand, as we have already pointed out, if the Great Northern owned the dock and trackage in Wisconsin and bargained with one of several independent companies owning trackage in Minnesota, it could equally well obtain for the Wisconsin Dock service, a proportion of the total charge exceeding even the investment proportion. As a matter of fact, it owned or controlled both the Minnesota trackage and the Wisconsin trackage and docks, and its ownership of the iron mines added equally to the value of both.

c. *If the company had taken a lease of the dock.*

If we had leased the dock in Wisconsin at an annual rental, instead of actually owning it, the disproportionate investment argument would be just as applicable. The value of the property in Wisconsin we would be devoting to the ore service would be just as great, even though we rented the dock instead of owning it, and the portion of the earnings attributable to the dock would remain the same. The carrying charges would be paid out in the form of rental instead of in the form of interest or dividends. If the dock were located in Duluth, we concede that Minnesota could tax the entire property or the entire earnings, whether the dock were owned by us or only rented. There would then be no question of taxing earnings accruing in Wisconsin.

d. *The comparison between the Great Northern and a company using but not owning a dock in Wisconsin.*

On pages 30 and 31 of our original brief, we argue that of two competing railroads handling ore traffic and having similar mileage and similar volume of traffic in Minnesota, one might own its own dock in Wisconsin, while the other might pay a division of the through rate to an independent dock company for the handling of its ore traffic, the total charge being the same in both cases. We argued that under these circumstances, the state would assess a much heavier tax against the company owning its own dock in Wisconsin. Counsel for the state deny this and insist that each would pay the same tax. This is clearly not so. If one company paid a division of the total charge to an independent dock company, that division would not be a part of the earnings of the railroad company operating in Minnesota. It would clearly be entitled to deduct from the total charge collected by it, the amount of the division paid to the independent dock company. But the competing company owning its own dock in Wisconsin would, if the state's contention is sustained, be compelled to prorate its entire charge. One would pay a higher tax than the other, although the property, the service and the traffic in Minnesota would be the same on each line.

THE PRACTICE IN MINNESOTA AS TO OTHER TERMINAL CHARGES.

Counsel for state contend that charges for demurrage, switching and storage, which are taxed 100% if accruing in Minnesota, and not at all if accruing outside, are different in character from charges for grading and mixing ore, because they are no part of the transportation movement, but constitute a separate local service, performed for the convenience of the consignee,

and because the charge is separately assessed. We submit that the mixing and grading of ore is no more a part of the transportation than would be the sorting and sacking of potatoes, or the milling of wheat in transit. It is even less a part of transportation than switching or demurrage.

Counsel argue that switching and demurrage charges are different because charges are separately published and the service is not performed for all shipments alike, and the charges are collected only from shippers who require the service. We submit that a service which is not a part of the transportation, such as the milling of wheat in transit or the grading and sorting of ore, does not become a part of transportation merely because it is availed of by all shippers, nor is its character altered by the fact that the compensation is included with the transportation charge in a single toll. We mention the practice as to switching and demurrage charges, merely as a recognition of the principle that a mileage prorate is not applicable to a service which does not involve track mileage, and where the amount of the charge does not vary with the length of the haul. We believe that any part of the total ore charge which is fairly attributable to the dock service is just as much subject to this principle as would be a switching or demurrage charge.

Respectfully submitted,

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Appendix A.

Act of January 31, 1928, C. 14, 45 Stat. 54.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.

"Section 2. That in all cases where an appeal may be taken as of right it shall be taken by serving upon the adverse party or his attorney of record, and by filing in the office of the clerk with whom the order appealed from is entered, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof. No petition of appeal or allowance of an appeal shall be required: Provided, however, That the review of judgments of State courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts."

Appendix B.

Computation from figures in the record of payment to Dock Company, in cents per ton, required to pay (a) 6% interest on the investment, and (b) 6% interest on investment plus operating expenses, 1908 to 1912 inclusive (the only years for which investment figures are available). Figures in parentheses refer to footnotes.

cc. 1	cc. 2	cc. 3	cc. 4	cc. 5	cc. 6	cc. 7	cc. 8
Year	Tons (1)	6% on inv. (3)	Cents per ton required to pay 6% on inv. (4)	Dividend (5)	Excess of div. over 6% (6)	Excess per ton-cents (7)	Cents per ton required to pay operating exp. plus 6% (8)
1908 1909	10,036,235[2]	$230,221 229,684	4.6	$1,435,000	$975,095	9.7	14.3
1910	8,436,387	237,285	2.8	735,000	497,715	5.9	16.1
1911	9,791,802	323,909	3.3	1,000,000	676,091	6.9	15.1
1912	13,916,803	317,648	2.3	1,450,000	1,132,352	8.1	6.9
Total	42,181,227	$1,338,747	3.2	$4,620,000	$3,281,253	7.8	12.4

(1) Tonnage figures obtained by dividing total payment to Dock Co. (R. 5) by number of cents per ton paid. (R. 66-7).

(2) Figures for 1908 and 1909 are combined because no dividend was paid in 1908, the 1909 dividend being the product of both years.

(3) For investment figures, see (R. 60-62, 97-100).

(4) Column 3 divided by column 2.

(5) For dividends paid, see (R. 102).

(6) Column 5 minus column 3.

(7) Column 6 divided by column 2.

(8) Number of cents actually paid to Dock Co. (R. 66-67) minus column 7.

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BRIEF FOR THE STATE OF MINNESOTA.

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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 106.

GREAT NORTHERN RAILWAY COMPANY,

Plaintiff in Error,

vs.

THE STATE OF MINNESOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Filed April 9, 1928.

No. 107.

GREAT NORTHERN RAILWAY COMPANY,

Appellant,

vs.

THE STATE OF MINNESOTA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA.

Filed April 9, 1928.

BRIEF FOR THE STATE OF MINNESOTA.

STATEMENT OF THE CASE.

The State of Minnesota brought action against the Great Northern Railway Company in the District Court of Ram-

sey county, Minnesota, to recover taxes for the years 1901 to 1912, inclusive, amounting to $536,402.18, together with penalties and interest running up to more than half a million dollars (R. 4). No recovery was allowed by the court for taxes for the years 1901 or 1902 and no penalty or interest was allowed for any of the years because all the taxes were included in the single assessment (R. 205). Judgment was entered in favor of the State for taxes for the years 1903 to 1912, amounting to $479,580.58 (R. 204), which amount bears interest at the rate of six per cent per annum from September 30, 1922, the date of the order for judgment (R. 211). The State appealed from so much of the judgment as denied its claim for taxes for the years 1901 and 1902 and its claim for penalty and interest. The company appealed from that part of the judgment which held it liable for taxes for the years 1903 to 1912. The Supreme Court of Minnesota affirmed the judgment on both appeals. *State of Minnesota vs. Great Northern Railway Company*, 160 Minn. 515. The company thereupon sued out a writ of error to this court, which was dismissed for want of jurisdiction. *Great Northern Railway Company vs. Minnesota*, 273 U. S. 658 (decided January 17, 1927). Thereafter the company petitioned the State Supreme Court for a vacation of its former judgment and for a reargument. The petition was granted (R. 223-224). Upon the reargument the court considered and determined the constitutional questions here involved and again affirmed the judgment of the trial court. *State of Minnesota vs. Great Northern Railway Company*, 174 Minn. 3 (decided March 2, 1928) (R. 224-231).

The case is now here for a review of the judgment entered pursuant to the decision of the state court (R. 231).

STATEMENT OF FACTS.

In Minnesota property of railway companies has always been taxed by the so-called gross earnings method. This method of taxation was originally provided for in charters incorporating railway companies as they were issued by the territorial and later by the state legislature. In 1871 the people of the state adopted a constitutional amendment which provided, in substance, that any law theretofore existing, or thereafter enacted, providing for the taxation of railway companies by this method, might be repealed, amended, or adopted only on submission to and approval by a vote of the people. Since 1871 each law affecting the taxation of railway companies has been so submitted. The system has, however, remained the same since the beginning, changes having been made only in the rate. By 1887, as indicated in Laws 1887, chapter 11, Laws 1889, chapter 235, and General Statutes of 1894, section 1669, the system had become one of general application. No railroad company has ever, in the history of this state, attacked the law either upon the ground of the invalidity of the system as such, or upon the ground that the method of apportionment operated to burden interstate commerce or to tax property beyond the confines of the state. The system has been satisfactory to the railway companies of the state and to the people.

The tax is one imposed upon all property of each railway company held and used in its railway operations. It is in lieu of all other taxes. In terms it requires every railway company to ascertain and compute its entire earnings upon the business done wholly within the state and a proportion, based upon the proportion of mileage within the state to the entire mileage over which the particular transportation

service occurs, of earnings on interstate business. The railway company is not required to report the details of that computation. It furnishes to the state a single statement of its gross earnings within the year, and upon this statement the tax is computed. There is statutory provision for auditing these reports and for the assessment of additional amounts on account of any errors or omissions which the railway company may make in its gross return.

The appellant, in apparent compliance with this law, reported its earnings and paid the taxes computed thereon in each of the years 1901 to 1912, inclusive. In the course of time, the public examiner of the state examined the books and records of the company for the purpose of determining whether or not its taxes had been correctly computed during each of those years. He reported the omissions which are involved upon this appeal, and pursuant to the statute computed additional taxes to be assessed against the company on account of its alleged omissions.

The omissions related wholly to receipts coming to the company for hauling iron ore over its lines between points on the Mesaba Range in northern Minnesota and Allouez Bay at Superior in the state of Wisconsin, a haul distance of 107 miles, 81.55 per cent of which mileage was in Minnesota. The allegation was that the company had not reported 81.55 per cent of its receipts from the movement of this ore, but had deducted from each ton of ore transported the sum of twenty-five cents from May 1, 1902 to July 31, 1909; twenty-two cents from August 1, 1909 to December 25, 1911, and fifteen cents from December 26, 1911 to December 31, 1912.

The company admitted that the alleged deductions had been made and that the state's quantities, amounts and cal-

culations were correct, and it asserted that the deductions were properly made before making the mileage apportionment. It alleged that it had paid all of the amounts so deducted to the Allouez Bay Dock Company, or its predecessor the Duluth, Superior & Western Terminal Company "as and for their respective proportions of the entire transportation charges, for their services in the transportation and handling of iron ore in the state of Wisconsin" (R. 6), and it alleged that it had allowed and paid to the Allouez Bay Dock Company and its predecessors, in the amounts referred to, substantially that portion of the whole tariff charge (eighty cents per ton until December 26, 1911, sixty cents thereafter) which the property investments of the Dock Company bore to the investments of the Great Northern in the trackage over which the ore moved (R. 10). And there were allegations in different forms of statement that if the gross earnings laws should be interpreted so as to uphold the state's claim it would violate various provisions of the state and federal constitutions (R. 8-12).

On the trial the evidence related almost exclusively to the relationship which existed between the Great Northern and the company owning the docks at Allouez Bay. It involved various corporations and a partnership, which the company caused to be formed or which it took over and controlled and dominated. Mainly, it went to the issue as to whether or not there were any real divisions of the earnings between the Great Northern and the Allouez Bay Dock Company, or its predecessor Duluth, Superior & Western Terminal Company, and as to whether there was, regardless of the singleness of ownership and operation of lines over which ore was carried to and over the dock to Allouez Bay, performance of a localized service at the docks, for which a charge might

have been made and which might have been deducted from the earnings before apportionment under the Minnesota statute.

The constitutional objections urged by the company in its answer were never referred to in the trial court. There was no error assigned on them upon the company's appeal to the Supreme Court. They were not discussed in the briefs or upon the argument in the Supreme Court. They were first again referred to upon a supplemental petition for rehearing after final decision in the Supreme Court.

The trial court found that all of the ore, after 1902, was hauled by the Great Northern over its own lines and docks and delivered by it aboard vessels. It found that the Allouez Bay Dock Company and its predecessors were agencies through which the Great Northern held ownership of the docks and adjacent trackage. It found that there were no divisions of earnings with the Dock Company or its predecessors (R. 195-202). It found:

> "The said ore line, from the said first day of January, 1901, to the said 31st day of December, 1912, from the mines in Minnesota to and including the docks at Allouez Bay, was a single, continuous railway line. It was projected, built and operated as such for the purpose of carrying ore from the mines to be unloaded into vessels beside the docks, and for no other purpose. There was but a single charge, during all of said period, for a continuous unbroken railway service. There was no separation of said lines into separate or connecting parts, yards, or terminals at Saunders, Wisconsin, at the Omaha Crossing, so-called, or at Allouez Bay Dock. There was no separate or local railway service performed at any of said points. Service at the docks was a nec-

essary and appropriate part of the transportation business in hauling ore over said line" (R. 200).

That finding was sustained on appeal.

The form and subject-matter of appellant's argument necessarily involves an attack upon the findings of the court below. Counsel do not rest their case upon the proposition that the existence of valuable terminals outside of the state demonstrate the invalidity of the Minnesota statute. They say that they do not challenge the validity of the law in so far as it taxes the company's property by employing line haul earnings as the measure of the tax. The assertion is that earnings growing out of purely local services furnished by valuable terminals owned by a subsidiary and situated beyond the boundaries of the state are taken into the calculation, with the effect of taxing such foreign property. The court below found in substance that this terminal was in fact owned and operated by the Great Northern and that it performed there no local service, separate from the line haul, distinguishable from the customary and familiar freight or passenger terminal service. The record amply sustains these findings but the challenge of counsel makes necessary a fuller statement of the detailed facts than otherwise would have been necessary.

The testimony relates to transactions affecting the ownership of three sections of line over which ore was carried: the part from the mines to Saunders, Wisconsin, about one hundred miles; the part from Saunders to Allouez Bay, about six miles; and the Allouez dock with its approach, about one mile.

Prior to 1901, the dock at Allouez Bay and approaching trackage (Omaha crossing) was bought by the Duluth, Superior & Western Terminal Company, all of whose stock was

controlled by the Great Northern Company, at a receiver's sale for $760,000 (R. 97, 15).

In 1901 and prior thereto the Eastern Railway Company of Minnesota operated as part of its railway system the trackage between the mines and Saunders. The Great Northern owned all of its stock (R. 17, 29, 36-38). On May 1, 1902, the Great Northern took a lease of all of the lines of the Eastern Company and thereafter the ore was moved by and in the name of the Great Northern (R. 18, 46). Until 1906, no printed tariff was issued. But the testimony is that charges, services and conditions of transportation were as described in the subsequently published tariffs. The tariff issued in 1906 and all those subsequently issued provided for the transportation of ore by the Great Northern from the mines to Allouez Bay and the loading of it on boats at a prescribed rate (Plaintiff's Exhibits "E," "I"—R. 146-157). The tariffs named no connecting or associated carrier and fixed a single charge for the service performed, including delivery to the vessel.

During 1901 and 1902, the trackage from Saunders to the dock, and the dock itself (there was but one dock then, others being added at intervals thereafter) were held in the name of Duluth, Superior & Western Terminal Company (R. 44-46). All of the stock of the Terminal Company was held in the name of the Lake Superior Company, Ltd., which was a partnership composed of the officers of the Great Northern acting as trustees of the Great Northern (R. 15, 26—Plaintiff's Exhibit "C," R. 140).

In 1903 the Great Northern caused the Allouez Bay Dock Company to be organized. The stock was at first held by the Lake Superior Company, Ltd., in trust for the Great Northern (R. 16).

On June 1, 1903, the Great Northern took in its own name from the Terminal Company a lease of the trackage from Saunders to, but not including, the docks (R. 46). It caused the Terminal Company to lease the docks to the Allouez Bay Dock Company (R. 16, 17). Then the Great Northern immediately took a lease of the docks from the Dock Company (R. 29, 30—Plaintiff's Exhibit "J," R. 157).

In 1908, by resolution of its directors, the Great Northern Company directed the Lake Superior Company to cause the Terminal Company to deed and convey the trackage east of Saunders to the Great Northern Company and to convey the docks to the Allouez Bay Dock Company (R. 17, Plaintiff's Exhibit "N," R. 179-182).

During all this period these various companies had common officers (R. 16-25, 32-34).

On July 1, 1907, the trackage from the mines to Saunders, which had theretofore been under lease from the Eastern Railway Company of Minnesota, was conveyed to the Great Northern (R. 34). In April, 1913, effective as of December 31, 1912, there was conveyance of the docks to the Great Northern (R. 104, 105).

There were other stock transfers hardly susceptible of explanation. In 1908 the stock of the Allouez Bay Dock Company was sold to the West Missabe Land Company for a consideration, it is said, of $100,000 (R. 88), although in the preceding year that stock had paid dividends of $2,000,000, and during all the period of the company's existence regularly earned dividends amounted to more than $1,000,000 annually (R. 102). All of the stock of the West Missabe Land Company was, until 1906, owned by Lake Superior Company, Ltd., in trust for the Great Northern, but in 1906 it was assigned and transferred to the

Great Northern Ore Trustees. In the "Ore Trust" the Great Northern Company divorced its mining properties from railway properties, assigning them to stockholders of record on December 7, 1906 (Plaintiff's Exhibit "O," R. 182). In April, 1913, effective December 31, 1912, the Great Northern bought back from the West Missabe Land Company the stock of the Allouez Bay Dock Company at a stated consideration of $600,000 (R. 88, 103).

In 1901 and 1902, the testimony is, the Terminal Company was paid twenty-five cents per ton for its share of the ore haul from Saunders to the docks and for the services performed at the docks (R. 66). This arrangement was not in writing. When the Great Northern, on June 1, 1903, leased the trackage from Saunders to the docks from the Terminal Company, and after the leasing of the docks by the Terminal Company to the Allouez Bay Dock Company, an agreement was executed under which the Great Northern Company agreed to pay to the Dock Company the same sum of twenty-five cents per ton for the right of moving its cars upon the docks and for the work of the Dock Company in unloading them (R. 31). It is perhaps significant that this agreement required the Great Northern Company, when requested by the Dock Company, to "pay the employes of the Dock Company" and "all bills for materials and repairs and otherwise" incurred in the operation of the docks, not exceeding, however, the amount to be paid by the Great Northern at the rate of twenty-five cents per ton (Plaintiff's Exhibit "J," R. 157, 159). The testimony is that this lease remained in effect until December 1, 1908 (R. 30), and there was no agreement in effect between that date and August 1, 1909, but the payments at the rate of twenty-five cents per ton continued (R. 30). There was a new lease as of

August 1, 1909, fixing the Dock Company's compensation at twenty-two cents per ton (Plaintiff's Exhibit "K," R. 160, 30). The testimony is that this lease remained in effect until December 26, 1911, when by oral modification the Dock Company's compensation was reduced to fifteen cents per ton (R. 30, 27).

There was testimony descriptive of the trackage and yards east of Saunders, of the docks and of the detailed operations of those yards and docks: in substance that there were trains moving ore from different mines and of different grades and that it was necessary to break up these trains and assort and switch them so that the ore might be dropped through the hopper bottoms of the cars into the proper bins upon the docks. It was said that ore sometimes stuck in the cars and there was necessity of employing men with long poles to remove it from the cars. In the spring and late months of the season, ore froze and there was the necessity of thawing it. It was said that these switching and unloading operations were carried on by employes of the Dock Company under supervision of the manager of the dock, and that they were not Great Northern employes (R. 45, 49-52).

The Supreme Court said among other things of the testimony in reference to the separation of ownership:

> "No carrier in absolute control of the transportation line from mine to boats, owning in its own name the legal title to all of the line except the dock, having the advantages of the ownership of that through the ownership of all of the Allouez stock, and having so profitable a haul, would part with the last mile. The Great Northern did not. Whatever the form and whatever the agency the Great Northern kept the beneficial own-

ership. From the beginning it controlled the ore traffic. It received all the freight earnings. It was the beneficiary of all the income from its two organizations, the Terminal Company and the Allouez Company, which it officered and controlled" (160 Minn. 515, 521).

And as to whether or not there was a separate local service for which a charge over and above the transportation charge might have been, or was, assessed, it said:

"The defendant never regarded the service in its yards or the service on the docks as something for which an additional charge could be made. No such charge ever was made. Everything which was done with the ore from the time it started from the mines and until it was put into the boats and the boats trimmed was included in the haul. Reference is made to the thawing of ore on the dock, sometimes necessary in the late fall. Compared with all the ore passing into the dock it amounts to nothing. No specific charge is ever made for it. The expense is absorbed in the freight rate on all the ore and not charged against the specific ore receiving the service. The same is true of the storage service furnished to particular ore. The ore receiving the service is not charged for it. It is absorbed in the freight charge on all ore. Reference is made to the services in the yard between Saunders and the Omaha dock. Sorting the cars was necessary so that when they went upon the dock they would be unloaded in the proper boats. Every railway has extra work at its terminals. The expense of it is absorbed in the tariff. We do not get from the evidence the notion that the yard sorting or the work on the docks was an unusual burden. The cars moved in solid trains of hopper bottom cars,

made a quick run from the mines, were sorted and hauled onto the high docks, were cared for promptly at the beginning of lake transportation, and were on the way back to the mines with little waste" (160 Minn. 515, 523-524).

In support of its claim that the charge made or allocated for the dock service was a fair one, some figures were introduced as to the company's investment in Minnesota trackage, Wisconsin trackage, and the dock over which the ore was carried. None were offered for the years 1901 to 1907. The testimony was that those introduced were available because they had been prepared for another purpose (R. 114). It is upon this testimony, so accidentally coming into the record, that the present appeal is based. The testimony was that the books showed the following investments in the docks, the trackage between the docks and the Minnesota state line, the trackage in Minnesota between the state line and the mines, and in cars and equipment used in hauling the ore:

	Docks	Docks to State Line	Trac[illegible] Min[illegible]	[illegible]ment
1912	$5,294,137	$1 [illegible]76,689	$10,878[illegible]	$7,178,051
1911	5,398,476	1,631,450	10,739,8[illegible]	7,217,214
1910	3,954,743	1,600,842	10,365,297	6,726,037
1909	3,828,069	1,549,498	9,912,206	5,701,088
1908	3,837,014	1,531,886	8,982,903	5,705,042

(R. 60-62, 114.)

Incidentally, too, it appears that at some time after 1903 the value of the Allouez Bay docks represented only 14.25 per cent of the value of the company's properties constituting the Superior Terminal, which terminal, beside the ore docks, included grain elevators, merchandise docks, coal docks, yard tracks and shop buildings (R. 96).

It further appears that until May 1, 1902, the Eastern Railway Company of Minnesota operated as a unit a connected group of lines in northern Minnesota. On May 1, 1902, these lines were leased to the Great Northern Company, and on July 1, 1907, they were conveyed in fee. Apparently they represented a book investment of $31,783,545.04, because that was stated in the deed to be the consideration for their transfer (R. 167). They included: (1) a line from Hinckley, Minnesota, to Duluth, Minnesota, which line passed through Superior, Wisconsin; (2) a line beginning at a connection with the above described line at Boylston, Wisconsin, to Fosston, Minnesota; (3) a line between Hinckley, Minnesota, and Coon Creek, Minnesota; (4) a line connecting with the Boylston-Fosston line at Swan River, Minnesota, to Virginia, Minnesota; and (5) a line connected with the Boylston-Fosston line at Brookston, Minnesota, to Ellis, Minnesota. The system included about 400 miles of line. The relationship of these properties to the ore trackage as a matter of common knowledge and judicial notice is disclosed in the following portion of the opinion of the Supreme Court (174 Minn. 3, 7-8—R. 228-229):

> "To maintain its claim of unconstitutionality the defendant in a way segregates 107 miles of its railway system, 87 miles from its 2,000 miles in Minnesota, and 20 miles from its mileage in Wisconsin. It does not do this quite completely. It takes no account of the grain traffic coming to the head of the lakes over its line through Hinckley to the west and southwest, nor from its Fosston branch which reaches northern Minnesota and the states farther west and Canada. It takes no account of incoming freight except iron ore. It takes no account of outgoing freight. It takes no

account of passenger traffic coming to the head of the lakes, either to Duluth or Superior, or originating there and going west over its lines. It takes account of one commodity, iron ore, and rejects all others. But all this incoming and outgoing passenger and freight traffic passes over the tracks which carry iron ore in Wisconsin, with the exception of seven miles. Its ore traffic passes from Saunders, Wisconsin, as far north as Swan River, or perhaps farther, in Minnesota, over tracks which carry through traffic, passenger and freight, both ways. There are branches or stubs in Minnesota which are exclusively for iron ore and the usual tracks in connection with open pit mines. None of its freight or passenger traffic can reach its docks or depots at Superior or Duluth without passing over tracks which carry iron ore. What the use value is of trackage employed in common by ore and non-ore traffic, and how it should be apportioned, there is nothing to tell us. We do know that a transcontinental line makes common use of much of the ore carrying trackage in reaching the head of the lakes and in going from it, and that it can not reach the Great Lakes except by using trackage which its ore traffic uses in both Minnesota and Wisconsin."

SUMMARY OF ARGUMENT.

1. The gross earnings tax is a property tax and in lieu of all other taxes on the company's property used for railway purposes. Each year's tax is a single indivisible tax on the entire property measured by the aggregate gross earnings without reference to source. The tax sought to be enforced here consists of inseparable parts of the total tax

which should have been paid by the company during each of the years involved. It can not be treated apart from the tax in its entirety, and it can not be held invalid without holding invalid the gross earnings tax system. If there be no valid basis for this tax, there was no valid basis for assessment of any gross earnings tax at any time.

2. The arbitrary allocation of from fifteen to twenty-five cents per ton made by the company on account of "dock service" is sought to be defended on the theory that it constituted a service separate from transportation. But the findings of the court dispose of that theory, for they are to the effect that whatever was done on or about the docks was a part of the transportation movement comparable to the familiar switching, sorting, unloading and storing that is an incident of all transportation movements, freight and passenger. And conceding for sake of argument that an allocation of "dock revenue" was proper, the allocation made was exorbitantly high.

3. The constitutional questions now urged were set out in the answer and never again referred to until on the supplemental petition for re-argument after final decision in the State Supreme Court.

The question of value in Minnesota and in Wisconsin of the company's ore line property was not litigated. For the purpose of justifying allocation of earnings between the Great Northern and the Dock Company, there came into the record figures, available because prepared for another purpose, showing investments from 1908 to 1912. There was no showing of investments from 1901 to 1908. There was no finding by the state court of either investments or values. Upon such a record this court should not undertake to determine values.

Nor is there any showing either of the cost or of the value of the entire system in Minnesota, or of the relation of either cost or value of the ore line to the rest of the system.

The use value of the Minnesota portion of the ore line far exceeds the cost. The source and control of the entire traffic is in Minnesota. The dock has no use value apart from the source of traffic, and has no value above costs. If apportionment were made on the basis of property values, there should be attributed to Minnesota at least as much as the mileage pro rate gives to it.

Allowing the distribution of costs as claimed by appellant, and distributing the investment in equipment over the length of the ore line, and spreading the use value over mileage, would give to Minnesota approximately the mileage apportionment which the law prescribes. At least there can be no assumption that values in Minnesota and values in Wisconsin are equal to costs.

Since the tax is not based on a mileage apportionment of values but on a mileage apportionment of earnings, there can be no ground for the contention that property outside the state is taxed unless it be demonstrated that earnings do not correspond with mileage (and hence with values) as measured by a mileage pro rate of earnings. There is no such demonstration.

We are dealing with a substituted tax or a commuted tax applying a fixed rate to earnings—not to ascertained values. There can be but a single test of the validity of such a tax either under the commerce or due process clauses—does it amount to more than would be legitimate as an ordinary tax upon the company's property within the state. Calculations of taxes which might have been assessed on the general property basis show that the gross earnings taxes for the years

in question were far below what would have been legitimate as ordinary taxes.

Cases in which property of a whole railway system is valued, and the state's part is brought in by track mile apportionment for the purpose of taxing the value so apportioned at the ordinary rate, are clearly distinguishable.

4. The supposititious cases made by appellant tend to support rather than destroy the validity of the gross earnings tax system.

5. The miscellaneous local charges credited 100% to Minnesota for purposes of taxation—switching, storage, demurrage—are of a character different from the dock service. They begin only when the transportation movement has ended, and are performed only for the convenience and account of the consignee.

ARGUMENT.

I.

THE GROSS EARNINGS TAX SYSTEM MUST STAND OR FALL IN ITS ENTIRETY. IF INVALID IN ITS APPLICATION HERE, IT IS INVALID ALTOGETHER.

Appellant says:

> "We are not attacking the validity of these statutes as applied to interstate rail line earnings of the railroads. This court has held that similar statutes are constitutional as applied to line haul earnings. What we are contending is that there would be a violation of the federal constitution in applying such a statute to the Wisconsin dock revenue involved in this case" (Appellant's Brief, p. 6).

Again:

> "* * * We are not claiming that the statute is wholly unconstitutional or that it is unconstitutional as applied to ordinary revenue. Our only claim is that the application of the statute to this particular revenue derived from the operation of Wisconsin docks is unconstitutional" (Appellant's Brief, p. 40).

But the gross earnings tax is a single tax upon all of the property of the company within the state. It can not be valid in part and invalid in part. The legislative declaration in effect is that a fixed percentage of gross earnings measured and apportioned in accordance with the statutory declaration will produce a fair tax on all of the company's property. There is no separation of the company's system into lines or parts of lines; there is no separation of road-bed and structures. There is no separation of earnings as respects their source. There is the single definition which describes earnings arising from railway operations and there is an apportionment the aim of which is to reach earnings attributable to property within the state. The law commands and permits a single gross computation of earnings, a report of the total of such earnings, and payment of the tax as a single sum. Of course no one would assert that each mile of track within the state will produce equal gross earning or that each mile of track will be of equal value. And of course the terminals, depots, shops and yards will directly produce either no earnings whatever, or will produce only relatively small earnings. The system rests upon the theory that each railway company in the state will have and own in connection with its lines within the state appropriate terminals, depots, office buildings, shops and like properties and structures which will be commensurate with

the business done in the state, and that the prescribed percentage of gross earnings will produce a tax equivalent to that which would result from a valuation and levy on the *ad valorem* basis. All of such properties, as well as trackage, are relieved of any other taxation whatever upon the payment of the amount assessed.

State vs. Northern Pacific Ry. Co., 139 Minn. 473, 475.
State vs. Wells Fargo Co., 146 Minn. 444, 453.
State vs. The Pullman Co., 146 Minn. 458.
United States Express Co. vs. Minnesota, 223 U. S. 335.
Cudahy Packing Co. vs. Minnesota, 246 U. S. 450.

The property of the company in the state, and all of it, is the subject of the tax. There is in effect a legislative assessment of taxes resting upon the legislative determination that a tax so computed will impose only a fair burden upon the property of the company. Such a tax must stand or fall as a single assessment. Here the attack is made upon only a part of the tax, upon the accidental circumstance that something less than the whole tax is involved in the judgment appealed. It is true that the court can declare this supplementary sum, which the law says should have been included in the single assessment provided for, to be uncollectible, but a decision to that effect must rest upon the ground that our gross earnings statute as interpreted and applied in this case is invalid in its entirety. Obviously, if the statute can not be applied to earnings arising out of the hauling of iron ore, and if there is no valid law as to that much of the company's property, there is no law applying a tax to any part of its property.

Meyers vs. Wells-Fargo, 223 U. S. 298.

We must consider, therefore, whether the gross earnings

law, as applied to the whole of the company's property in the state, was and is invalid upon the showing here presented.

II.

The Findings of the State Court Dispose of Appellant's Contention that "Wisconsin Dock Revenue" Could not Be Taken into Account in Arriving at Minnesota Earnings.

If the true position of appellant is that the statute is invalid only in its application to "the Wisconsin dock revenue" it is wholly disposed of by the findings of fact. There was no dock revenue, and there was no such application of the statute. The alleged dock revenue consisted merely of an allocation by the Great Northern Company of parts of its earnings to a corporation which it owned, controlled and directed, and which it brought into existence for that purpose.

Aside from the creation and dissolution of corporations for this purpose and the making and changing and abandoning of fictitious agreements, the claim that any dock revenue was included in the calculation of gross earnings in this case must rest upon the fact that a separate service, other than a transportation service, was performed at the Allouez dock for which a charge might have been made. Perhaps it must rest upon the fact that a separate charge for that specific service was in fact made at rates fixed by published tariffs. But the findings are that there was no such separate service, and that no separate charge was actually made against shippers for any separate service.

Do the facts, notwithstanding the findings, require a determination that such separate services were performed or

charged for at the docks? And, if so, what were the earnings or charges for such services? In view of the findings we even doubt the propriety of discussing such a question. Our comment will be brief.

At every railway terminal or transfer point there must be facilities for unloading or loading and otherwise caring for passengers and freight. Such terminals are incidental to and a necessary part of all forms of transportation. When, therefore, it is said that switching and sorting was necessary at the docks, no more is said than that switching and sorting is necessary at every terminal. When it is said that ore in the early spring and late fall sometimes freezes, no more is said than that railways must always, both in transit and at terminals, protect commodities and passengers against the elements, except that as to iron ore only an insignificant part of it must be so protected. When it is said that ore sometimes sticks in the cars and must be worked loose by the use of long poles, or that it sometimes must be stored, no more is indicated than that freight must be unloaded and stored and that passengers must be cared for. When it is said the ore must be sorted into grades, deposited in special bins and so mixed, the declaration is no more than that cars always must be switched and sorted so as to carry out the consignor's directions. In a word, the record simply is that there was a terminal service appropriate to the unloading of ore and that unloading was provided for in the most efficient and economical manner, probably at less cost per ton than any other commodity, possibly at less cost than unloading passengers at passenger depots. The service performed at the ore docks was no more local in character and no more separable in nature than were the services at the coal or merchandise docks or the freight or passenger terminals of

the company constituting the Superior terminal. And these, if we understand appellant's position, are conceded to involve no service separable from the line haul.

If the conclusion were otherwise, the query would arise: what was the value per ton of the special or local service? Appellant says, of course, it was of the value per ton which it deducted over the period covered by this record. That is, until June 1, 1903, the service of hauling from Saunders, switching, sorting and the dock service was worth twenty-five cents per ton. Until December 1, 1908, although the Great Northern Company acquired the tracks and yards east of Saunders under lease, and only the dock service remained, it continued to be worth twenty-five cents per ton. After August 1, 1909, it was worth twenty-two cents per ton. During 1912 it was worth fifteen cents per ton. The charge for the haul from the mines, including delivery on the boats was, until December 26, 1911, eighty cents per ton, and thereafter sixty cents per ton. Appellant produced in evidence a tariff of the Director General of Railroads for the Duluth, Missabe & Northern in conjunction with the Great Northern Company, as of January 18, 1919, when there was special occasion to move a quantity of ore over the Duluth, Missabe & Northern by way of Allouez docks, fixing a charge for dock service at five cents per ton. In the years 1901 to 1912 there was, by these allowances, attributed to dock service the sum of $16,491,359.43 (R. 3), resulting in dividends amounting to $11,430,000 (R. 102)—this as compensation for the use of property in which the original investment was $760,000, and which in 1912 was carried at the book value of $5,294,137. Considering that these docks existed and were owned and controlled by the Great Northern Company before the Dock Company ever came

into existence, and considering the seemingly arbitrary nature of the allotments, and their excessiveness in comparison with the Great Northern investment in the dock, it must be concluded that the record gives no warrant whatever for accepting the value put upon the dock service by the company, and, more, affords no basis whatever for assigning any separate value. Appellant's case falls, therefore, on the findings and on the facts.

III.

THE INCIDENTAL SHOWING OF COMPARATIVE ORE LINE INVESTMENT IN MINNESOTA AND IN WISCONSIN SERVES NEITHER TO REFLECT VALUES NOR TO AFFECT THE VALIDITY OF A TAX COMPUTED ON THE GROSS EARNINGS BASIS.

The company showed the cost of the rails and docks for 1908 and subsequent years. The investment in Wisconsin was greater per mile of track than in Minnesota. This showing was not made in support of the contention now made. There was no attempt to show the value, except as reflected in cost, either of the Minnesota property or of the dock. There was no issue as to value. Only costs for a portion of the period here involved were presented. There was no finding in the state court as to value and no finding was sought. The comment of this court in *Casey vs. United States*, 275 U. S. 413, 416, is pertinent:

> "A court * * * rarely can be justified in giving judgment upon grounds that the record was not intended to present."

Is there warrant for now holding, on this meager evidence, that in effect the gross earnings system of taxation, with its mileage apportionment, operates to tax property outside of

Minnesota? Certainly there is no direct taxation of outside property. There is no direct valuation of property for purposes of taxation either within or without the state. The theory, of course, is that gross earnings measure value and that apportionment on that basis is the equivalent of apportioning appraised values. But obviously, while it is true that ordinarily gross earnings reflect values there is no exact correspondence. Even less need there be any correspondence between earnings and value on only part of the system. And it is even clearer that mere proof as to cost or investment of the different parts of a railway line do not show the value of each specific component. Proof that gross earnings and costs do not correspond falls far short of showing that gross earnings do not truly reflect values. It tends rather to show that costs do not accurately reflect values.

The contention deals only with a portion of the company's lines in Minnesota, a relatively small portion considering the whole mileage within the state—87 miles out of about 2,000 miles. On the other hand, it involves a relatively large part of the earnings. No facts are furnished to show whether the investment in the 87 miles of trackage was a relatively large or relatively small portion of the company's investment in the whole state, but it fairly may be inferred that investments of the company in this trackage was approximately in proportion to total mileage within the state, hence relatively small.

There is no evidence whatever as to relative costs for years prior to 1908. There is evidence that at the beginning the cost of the dock was $760,000; that the investment in it increased yearly until 1908, but there is no evidence as to the original investment in the Minnesota portion of the line, or as to whether there were important variations prior

to 1908. There can be no just inference on the record as it stands that the relative distribution of costs was the same before 1908 as afterward.

And there is evidence in the record indicating that values in Minnesota have no relation, or very little relation, to cost. The calculation may be made, and is made, in appellant's brief showing that Minnesota's 87 miles of line over which ore is hauled furnishes about one-fourth of all earnings within the state over the more than 2,000 miles of system there. It is fairly to be inferred that this particular trackage is much more valuable per mile than any other property within the state, and immeasurably more valuable than cost. And the record definitely shows that allotting to the dock at Allouez the portion of earnings which appellant claims it was entitled to on the basis of cost apportionment gave to the dock property a value greatly in excess of cost.

The great difference between earnings over the ore trackage and earnings over remaining mileage in Minnesota, with no indication of like differences in investment costs, suggests the danger of trying to determine relative values of different portions of the interstate ore line on the cost basis rather than on the mileage basis. And that difference suggests the danger of considering the validity of an important, long established and satisfactory taxing system in the absence of complete data.

If this line is to be considered as something separate and apart from the company's system in Minnesota, it should be treated as one furnishing a continuous indivisible service between the mines and the boats resulting in earnings having no relation to the cost of any particular portion of the whole. If a separation of values at the state line must be made, and if the value comes from the existence of an ex-

traordinary amount of profitable traffic, the fairer basis of separation will deal with the traffic or the earnings, not with cost factors which are not here an important element in making value. So divided, almost the whole value of the line lies in Minnesota. The traffic is wholly attributable to Minnesota. Its source is there and the control of it is there. When the Minnesota trackage and the Wisconsin trackage and the docks were separate, the Wisconsin portion of the property had no value above cost. The Minnesota line was part of a complete system reaching the mines and entering Duluth and Superior, and slight as it is, there is enough in the record concerning the issuance of certificates of beneficial interest in ore lands to Great Northern stockholders in 1896 to indicate that the Great Northern Company controlled the traffic through ownership of iron mines. At Duluth or Superior, it could lease, buy, or build docks. It could negotiate for a division of earnings with the independent owners of the Wisconsin trackage and the docks. Whichever it did would necessarily be on the basis of cost of that trackage and docks, since it would not lease or buy or divide earnings on a basis higher than cost of building on its own account.

If we were here considering a direct valuation, as by the appraisement of an assessing officer or body, it would be quite apparent that an apportionment on the mileage basis of the whole value of this line, rather than on a cost basis, could not be set aside if it attributed to the Minnesota mileage the whole or principal earnings value of the ore line, leaving to Wisconsin cost value for a dock and adjacent trackage such as we have here. Having in mind the source and nature and value of the whole traffic, a division of the unit on the mileage basis will not be, to say the least, manifestly unfair or

arbitrary, and will not actually, and certainly not demonstrably, include in the Minnesota valuation elements which do not belong there.

Plainly there is an extraordinary use value in this line. If all of that use value be attributed to Minnesota as the source of the traffic, the mileage pro rate of earnings will give to the state less than what belongs there. Even if the use value be spread over the whole mileage, it will give to the whole line a very different and much larger value than appellant assigns to the different parts. Given its true value, allowing the distribution of costs as claimed, distributing the investment in equipment over the length of the ore line, and spreading the use value over mileage, Minnesota would be entitled to approximately the mileage apportionment which the law prescribes. As to what would be a fair distribution of the true value of this line there is no evidence. It is quite clear, therefore, that there can be no sound determination of this case on the assumption that values in Minnesota and values in Wisconsin are equal to costs.

But the ultimate question is not and can not be the existence or lack of existence of a value upon which the tax is calculated. We do not ascertain the value of the whole property of the company over its entire system and take a part of it for Minnesota. Neither do we ascertain earnings over the whole system and take a part for Minnesota. The measure of the tax is earnings within Minnesota only. If charges for railway service were fixed according to state lines, there would be no question for decision here. But since they are made between points within the state and points elsewhere, without separation at the state line, provision for some form of apportionment is necessary if the state is to keep within its borders. Seemingly there can be

no other basis and no fairer basis of apportionment than that of mileage for each separate earning. Furthermore, it would be utterly impractical to attempt to devise and to apply with equality any other basis of separation. At any rate, the use of the mileage apportionment of earnings does not, as does the mileage apportionment of ascertained values, directly tax or affect property outside the state. It is in purpose at least a method of keeping within the state; and until there is demonstration that the earnings do not correspond with mileage there can be no valid ground for the contention that property outside the state is taxed. There is no such demonstration in this regard.

At bottom appellant's case must rest upon the assumption that earnings vary with costs of construction over the railway line, or at least over that part of it over which any particular traffic moves. But the truth of that assertion is not self-evident and we are furnished with no facts tending to show its validity. On the contrary, the proof is that there was no separation of earnings on the cost basis or on the service basis, and no showing was made which justified or required any separation on either such basis. There was an indivisible service for a single charge; and even if the proof justified a belief as to this part of the company's line for these years that a cost basis of separation would have been preferable to the mileage basis, nevertheless it would have to be recognized that the federal constitution does not require the adoption of only perfect taxing systems. It does not require that the best of several fair or practical systems shall be selected. So far as here involved, it forbids the use of a system which operates to tax property beyond the jurisdiction of the state or which discriminates against interstate commerce.

In *Western Union Telegraph Co. vs. Taggart*, 163 U. S. 1, 28, this court said:

"Moreover, the cost of the property, or of its replacement, is by no means a true measure of its value."

In *Western Union Telegraph Co. vs. Massachusetts*, 125 U. S. 530, 552, it said:

"* * * Since the corporation was only taxed for that proportion of its share of capital stock which was supposed to be taxable in that state on the calculation above referred to, and since no real estate of the corporation was owned or taxed within its limits, we do not see why any deduction should be made from the proportion of the capital stock which is taxed by its authorities. But if this were otherwise we do not feel called upon to defend all the items and rules by which they arrived at the taxable value on which its ratio of percentage of taxation should be assessed; and even in this case, which comes from the Circuit Court and not from that of the state, we think it should appear that the corporation is injured by some principle or rule of the law not equally applicable to other objects of taxation of like character. Since, therefore, this statute of Massachusetts is intended to govern the taxation of all corporations therein, and doing business within its territory, whether organized under its own laws or those of some other state, and since the principle is one which we can not pronounce to be an unfair or an unjust one, we do not feel called upon to hold the tax void, because we might have adopted a different system had we been called upon to accomplish the same result.

"It is very clear to us, when we consider the limited territorial extent of Massachusetts, and the proportion

of the length of the lines of this company in that state to its business done therein, with its great population and business activity, that the rule adopted to ascertain the amount of the value of the capital engaged in that business within its boundaries, on which the tax should be assessed, is not unfavorable to the corporation, and that the details of the method by which this was determined have not exceeded the fair range of legislative discretion. We do not think that it follows necessarily, or as a fair argument from the facts stated in the case, that there was injustice in the assessment for taxation."

Other pertinent cases are:

The Delaware Railroad Tax, 85 U. S. (18 Wall.) 230.

Coulter vs. Louisville & Nashville R. R. Co., 196 U. S. 559.

Michigan Central Ry. Co. vs. Powers, 201 U. S. 245, 292.

Illinois Central Ry. Co. vs. Greene, 244 U. S. 555, 561.

Union Tank Line Co. vs. Wright, 249 U. S. 275, 282.

Bass Ratcliff & Gretton vs. State Tax Commission, 266 U. S. 271.

Here we have a substitute system of taxation whereby a fixed percentage of gross receipts ascertained by a method that is not arbitrary is taken to be the equivalent of a fair tax on all of the property of the company within the state. Whether the result is a fair tax can not be determined by any consideration of investments alone in any particular part of the company's property in the state or without the state, or of investments in the whole of the company's property. If the rate applied to earnings were the same as the rate applied to property generally in the state, then the law

could be tested by a consideration of earnings as compared with values within the state, because then the equality of its operation would rest upon the theory that earnings and values would exactly correspond. But the very fact that the gross earnings rate is a fixed rate necessarily varying from the general property rate indicates the belief and demonstrates the underlying theory of the law that while earnings reflect value there is no exact correspondence, and this fact indicates as well that only by separation of the two factors, to-wit, earnings calculated as the statute requires them to be calculated, and the rate, which in combination were intended to produce a fair tax, can there be any ascertainment of whether or not property outside the state has been taxed or whether commerce has been unduly burdened. The gross earnings system of taxation has been held by this court to involve no violation of any provision of the federal constitution. This method of arriving at a tax, which seemingly is arbitrary and not comparable with taxation in its ordinary form, this court has held, will not be overthrown until there is proof that the resulting tax by reason of excessiveness burdens commerce or reaches values beyond the the state's taxing power. If it be true that it will burden commerce only when excessive as compared with ordinary taxation, it must likewise be true that it will reach property beyond the state's jurisdiction only when it is in excess of what might properly have been charged against property of the company within the state. The first of these propositions is settled in the cases which we are about to cite. We submit that the second of the propositions follows from the nature of the legislation and is well within the reasoning of these cases.

This court, in *Pullman Co. vs. Richardson*, 261 U. S. 338,

in upholding a California gross earnings law modelled after the Minnesota law as applied to sleeping car companies, said:

> "In taxing property so situated and used a state may select and employ any appropriate means of reaching its actual or full value as part of a going concern—such as treating the gross receipts from its use in both intrastate and interstate commerce as an index or measure of its value—and if the means do not involve any discrimination against interstate commerce and the tax amounts to no more than would be legitimate as an ordinary tax upon the property, valued with reference to its use, the tax is not open to attack as restraining or burdening such commerce. *Cudahy Packing Co. vs. Minnesota, supra; St. Louis Southwestern Railway Co. vs. Arkansas*, 235 U. S. 350, 367; *United States Express Co. vs. Minnesota, supra; Galveston, Harrisburg & San Antonio Ry. Co. vs. Texas, supra*, p. 227; *Union Tank Line Co. vs. Wright, supra.*
>
> "An examination of the tax in question in the light of these principles shows that the chief objection urged against it is not tenable. The provisions under which the tax is imposed call it a property tax, specify the property subjected to it and declare that it is in lieu of all other taxes on such property. The Supreme Court of the state holds it is a tax on the property specified. In no material respect does it differ from the tax which was recognized by this court as a property tax in *United States Express Co. vs. Minnesota* and *Cudahy Packing Co. vs. Minnesota*, above cited. True, it is computed with special regard to the gross receipts, but this, as is fairly shown, is done merely as a means of getting at

the full value of the property, considering its nature and use. The tax is not claimed to be in excess of what would be legitimate as an ordinary tax on the property valued as part of a going concern, nor to be relatively higher than the taxes on other kinds of property. There is no ground for thinking that it operates as a discrimination against interstate commerce."

In *Cudahy Packing Co. vs. Minnesota*, 246 U. S. 450, this court in upholding the Minnesota law providing for the taxation of freight line companies, which law is substantially the same as that applicable to railroads, said (p. 453):

"* * * On the other hand, if what is done is to reach the property and not to tax the gross earnings, the latter being taken merely as an index or measure of the value of the former, it well may be that the objection urged against the tax is untenable; for, as this court has said, 'by whatever name the tax or taxes may be called that are fixed by reference to the value of the property, if they are not imposed because of its use in interstate or foreign commerce, and if they amount to no more than would be legitimate as an ordinary tax upon the property, valued with reference to the use in which it is employed, they are not open to attack' as restraining or burdening such commerce. *St. Louis Southwestern Ry. Co. vs. Arkansas*, 235 U. S. 350, 367; *Postal Telegraph Co. vs. Adams*, 155 U. S. 688; *Wisconsin & Michigan Ry. Co. vs. Powers*, 191 U. S. 379, 387; *Fargo vs. Hart*, 193 U. S. 490, 499; *Galveston, Harrisburg & San Antonio Ry. Co. vs. Texas*, *supra*."

And again (p. 455):

"Because the usual tax rate, if applied to the cash

value of the cars taken separately, would result in an appreciably lower tax, it is insisted that the tax imposed is in excess of what would be legitimate as an ordinary tax on the property. But the contention proceeds on an erroneous assumption. The state is not confined to taxing the cars or to taxing them as separate articles. It may tax the entire property, tangible and intangible, constituting the car line as used within its limits, and may tax the same at its real value as part of a going concern. The record makes it reasonably certain that the property, valued with reference to its use and what it earns, is worth considerably more than the cash value of the cars taken separately—enough more to indicate that the tax is not in excess of what would be legitimate as an ordinary tax on the property taken at its real or full value."

In *United States Express Co. vs. Minnesota*, 223 U. S. 335, this court sustained the Minnesota law providing for taxing express companies by the gross earnings method. The law there considered did not provide for a mileage apportionment of interstate earnings, but it was treated as not being distinguishable on that account from laws containing provisions for apportionment. After quoting from an earlier decision as follows (p. 345):

> "'By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the constitution.'"

It concluded (p. 348):

> "There is no suggestion in the present record, as shown

in *Fargo vs. Hart*, 193 U. S. 490, that the amount of the tax is unduly great, having reference to the real value of the property of the company within the state and the assessment made."

We submit that these cases mean that before a gross earnings tax law will be overthrown there must be proof that the resulting tax is excessive as compared with taxes imposed upon other property within the state. And we submit, too, that such a test is a simple and practical one.

In the case at bar no effort was made to show that the tax was in excess of an ordinary tax upon the property of the company within the state, nor in excess of an ordinary tax upon the ore-carrying line. We have evidence of the cost of the Minnesota line. Gross earnings taxes charged against it may be calculated upon the allocations made to the dock company and their relationship to the whole earning. The published reports of the Minnesota Tax Commission give the ordinary tax rate—the general property rate—for the years covered in the record. In this way we are able to make substantially accurate calculations as to the taxes which would have been assessed against the ore line on the general property tax basis applied only to costs. The reports of the Tax Commission show the average tax rates for the whole state and for the counties through which the ore line runs. The St. Louis county rate is much lower than the average for the state or for Itasca county. Taking that rate and applying it to the cost of the Minnesota trackage and the Minnesota proportion of the cost of equipment, and ignoring thereby its use value, we are able to show that the resulting tax would have been very much lower than is the tax which has been assessed under the gross earnings law which the company attacks here.

These calculations indicate that gross earnings taxes, with their mileage apportionment, were very much lower than what would have been legitimate as ordinary taxes on the company's property. Incidentally they indicate why the attack here concedes the validity of the gross earnings system except so far as these particular omitted assessments are concerned. They are as follows:

	1908	1909	1910	1911	1912
Value of Trackage in Minnesota	$ 8,982,903	$ 9,012,206	$10,365,297	$10,739,828	$10,878,951
Value of all Equipment	5,705,042	5,701,088	6,726,037	7,217,214	7,178,051
81.55% of Equipment (Minnesota)	4,652,462	4,649,237	5,485,083	5,885,638	5,853,701
Total Value of Trackage and proportion of Equipment in Minnesota	$13,635,365	$13,661,443	$15,850,380	$16,625,466	$16,732,652
	T. C. Rep. 1910 Page 413	T. C. Rep. 1910 Page 425	T. C. Rep. 1912 Page 717	T. C. Rep. 1912 Page 729	T. C. Rep. 1914 Page 343
Tax at average rate St. Louis County	18.59	18.41	21.90	22.28	21.39
Tax on ad valorem basis	$253,481	$251,507	$347,123	$370,415	$357,911
Total Gross Earnings, Ore Haul	$ 2,850,843	$ 5,199,326	$ 6,749,110	$ 7,833,442	$ 8,350,082
Minnesota Share, Gross Earnings, 81.55%	2,324,862	4,240,050	5,503,899	6,388,172	6,809,492
Gross Earnings Tax at 4%	92,994	169,602	220,155	255,526	272,379

COMPARATIVE TAX RATES IN ITASCA AND ST. LOUIS COUNTIES

	Itasca	St. Louis	Average for State
	T. C. Rep. 1910 Page 412	T. C. Rep. 1910 Page 413	T. C. Rep. 1910 Page 414
1908	30.29	18.59	26.98
	T. C. Rep. 1910 Page 424	T. C. Rep. 1910 Page 425	T. C. Rep. 1910 Page 425
1909	33.74	18.41	27.79
	T. C. Rep. 1912 Page 716	T. C. Rep. 1912 Page 717	T. C. Rep. 1912 Page 718
1910	35.72	21.90	27.92
	T. C. Rep. 1912 Page 728	T. C. Rep. 1912 Page 729	T. C. Rep. 1912 Page 729
1911	36.12	22.28	29.67
	T. C. Rep. 1914 Page 342	T. C. Rep. 1914 Page 343	T. C. Rep. 1914 Page 343
1912	35.47	21.39	27.74

Appellant cites several cases as being more in point and urges that they are controlling here. These cases are readily distinguishable.

In *Pittsburgh C. C. & St. L. Ry. Co. vs. Backus*, 154 U. S. 421, 430, the court, speaking of a valuation by a board, where the statute authorized, but did not require, apportionment within the state on a mileage basis, and in reference to a road which might run in two states, said:

> "Nevertheless, it is ordinarily true that when a railroad consists of a single continuous line the value of one part is fairly estimated by taking that part of the value of the entire road which is measured by the proportion of the length of the particular part to that of the whole road. This mode of division has been recognized by this court several times as eminently fair."

It added:

> "It is true there may be exceptional cases, and the

testimony offered on the trial of this case in the Circuit Court tends to show that this plaintiff's road is one of such exceptional cases, as for instance, where the terminal facilities in some large city are of enormous value, and so give to a mile or two in such city a value out of all proportion to any similar distance elsewhere along the line of road, or where in certain localities the company is engaged in a particular kind of business requiring for sole use in such localities an extra amount of rolling stock."

In *Fargo vs. Hart*, 193 U. S. 490, the court held that the valuation of the tangible property of Wells Fargo Company in Indiana as equal to that proportion of the whole property of the company which the tracks in Indiana, over which the company did business, bore to the trackage over which the company did business everywhere, where the whole property of the company included $15,500,000.00 of bonds not used in its express business, and which resulted in valuing the property in Indiana, tangibly worth about $28,000.00, at more than $800,000.00, operated to tax the company on property not within the state. Among other things the court said:

"But it is recognized in the cases that if, for instance, a railroad company had terminals in one state equal in value to all the rest of the line through another, the latter state could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside the state under a pretense."

In *Wallace vs. Hines*, 253 U. S. 66, the court held that a special excise tax upon doing business in the state at a rate of 50c for each $1,000.00 of capital, which, as applied to railroads, was calculated by taking such proportion of all of the stocks and bonds of the company as the main line

trackage in North Dakota bore to the main line trackage everywhere, operated to tax property beyond the state, where it was admitted, by demurrer, that there were included in the valuation of the whole property items of enormous value such as land grants, which added nothing to the value of the road within the state. The court said, too, that North Dakota was a state of plains. It was mainly agricultural. Its markets and the distributing centers from which it purchased were outside, and it naturally followed that the great and very valuable terminals of the roads were in other states. These things, the court said, made plain the injustice of assuming the value of the property or business of the companies to be evenly distributed over their trackage.

In *Southern Railway Company vs. Kentucky*, 274 U. S. 76, the court held invalid a Kentucky statute which sought to impose an annual franchise tax, in addition to other taxes on the property of railway companies, calculated by capitalizing the earnings of the company over its whole system and assigning to Kentucky its mileage proportion of such earnings. The proof was that the Southern Railway Company was taxed in Kentucky on account of a subsidiary there, which subsidiary was by the mileage prorate system assigned earnings of $3,642 per mile for 1917, and $3,623 per mile for 1918, when in fact its real earnings were $878 per mile in 1917, and for 1918 there was a loss of $4,741 per mile. The court at one point (p. 577) said:

> "The mere statement of the figures is sufficient to show that the amount added as a basis for franchise taxes is so excessive and unreasonable that it can not be sustained; and such an application of the system earnings amounts to an attempt to tax property outside the state."

None of these cases involves taxation by the gross earnings method. Only one of them involves an apportionment of earnings (net earnings), and the apportionment was made for the purpose of arriving directly at a valuation by the capitalization earnings method. All of them involve directly a determination of values. Furthermore, all determine value by appraising property of the whole system. Hence, there is a determination of values outside of the state and a direct taxing of that value. If the method of selecting the state's portion of the whole value of the system be such as to bring within the state a greater part of the value of the system than it actually has, there is directly and incontestably a taxation of property beyond the state's borders. The ultimate question under such general property tax systems is whether the company's property within the state has been fairly valued. Whether a track mileage apportionment of values will be fair is necessarily a question of fact in exactly the same degree as is the question of value itself. In the rulings under consideration, therefore, this court had to consider whether or not as a matter of fact a track mileage apportionment brought into the state a greater part of the value of the whole property than actually existed within the state. In some of the cases proof was clear and complete that no such value as was taxed by the state was within its borders. In one the evidence was not such as to satisfy the court that the board's valuation was arrived at by a track mileage apportionment which would have resulted in overvaluation under the circumstances. Such cases can have no bearing in considering the validity of the gross earnings tax where neither valuation nor ordinary tax rates are used in computing the tax.

IV.

Appellant's Supposititious Cases do not Demonstrate Invalidity of Tax.

a. *A two-mile tunnel in Wisconsin.*

Appellant suggests a number of different situations which, in its opinion, might exist and would be similar to that here presented and respecting which the law, if applied, would clearly be invalid. We conceive that such conditions could exist. But these suppositions demonstrate only that a gross earnings system of taxation can not be tested by rules or principles applicable to an *ad valorem* system. They do not demonstrate that a prescribed percentage of earnings over the whole system, or a part of the system, will exceed a fair tax upon the property of the system or upon any part of it. More important, they do not demonstrate that the system, regardless of the apportionment factor, operates to tax property outside of the state. One such assumption is that this ore might have been hauled through a very expensive tunnel to a destination only two miles beyond the state line with the result that Minnesota would collect a tax on, for instance, 98% of the earnings, while fifty or sixty per cent of the investment might be in Wisconsin. We answer that if only two miles of trackage remained in Wisconsin with no tunnel, Minnesota would collect the same tax although 98% of the value might be in Minnesota and 2% of it in Wisconsin. The effect would be that Minnesota, in either event, would tax property within the state of precisely the same nature and of precisely the same value in precisely the same amount. If the tax in the latter case were not invalid and did not reach property without the state, the same tax on

the same property in appellant's supposed situation would have no better basis for attack.

b. *An independent dock company.*

Appellant suggests again that if the Dock Company had been an entirely independent company receiving as its division of the entire charge the amount alleged here to have been paid by the Great Northern Company, the state could not include in its calculation any portion of its payments to the Dock Company. We offer instead a supposition nearer plausibility. If the Great Northern Company had connected with an independent carrier at the state line, which carrier owned the Wisconsin trackage and the docks, and if it divided earnings with that carrier on a basis which it fairly would have had to accord, Minnesota would probably collect on more than 81.55% of the whole ore charge and there would be no complaint of taxing property outside of the state.

c. *If the company had taken a lease of the dock.*

A further variation in the situation suggested by appellant is that if at Allouez Bay the Great Northern instead of owning the dock had taken a lease at an annual rental, its taxes would have been the same as now charged. But its disproportionate investment argument would be wholly unavailable under such circumstances. And if the company had leased a similar dock at Duluth, paying an annual rental, its Minnesota investment would have been smaller, its taxes would have been larger, and there would have been no Wisconsin property to be considered.

d. *The comparison between the Great Northern and a company using but not owning a dock in Wisconsin.*

Even more significant is the suggestion, in effect, that a line competing with the Great Northern might make arrangements for the use of a dock in Wisconsin. If the two companies operated on equal terms and for equal distances in Minnesota, their investments would vary greatly, because one owned a dock and the other did not, yet each would pay the same tax. This, we think, clearly demonstrates that the system does not reach or tax the dock since it imposes upon the Minnesota property of each company precisely the same tax. And we suggest that if a competing line acquired from the Great Northern the right to use the Allouez Bay dock and had equal traffic under the same circumstances with the Great Northern, only one-half of the dock investment would be chargeable against the earnings of each company, because "investment per car handled" (Appellant's Brief, p. 48) would be the basis of comparing investments, and the disproportionate investment as between the Minnesota mileage and Wisconsin mileage, including the dock, would wholly disappear.

In *State ex. St. Paul, Minneapolis & Manitoba Railway Co.*, 30 Minn. 311, 313, the question was whether or not rentals received by defendant, under an agreement permitting another railway company to operate over defendant's lines, might be included in gross earnings for the purpose of taxation, and the ruling was that they should not be so included, the court saying that "exacting 3 per centum upon the rent paid by the company, and upon receipts by the tenant earned by operating the railway, would be, to the extent of the rent, in the nature of double taxation, or rather

of exacting twice the commutation for taxes on the same property." There, assuming traffic to be equal, each paid the same tax, although one owned a railway line and the other did not.

The conclusion, it seems to us, must be that either the gross earnings system of taxation, with its mileage apportionment, is wholly arbitrary and intrinsically invalid on the ground alone that it uses earnings as a measure of the tax, and in that respect the mileage apportionment would be without substantial bearing; or that it is valid as a substituted method of taxing the property within the state, if not in excess of what might be assessed by ordinary methods; and the existence or non-existence, the value or lack of value, of property in Wisconsin, or in any other place outside of Minnesota, has nothing to do with the question.

V.

Other Local Charges Credited 100% to Minnesota Are Not Part of the Transportation Movement.

The argument is made, too, that the state includes in its calculation of earnings, without apportionment as to mileage, certain service charges, such as demurrage, switching and storage, even though performed in respect of shipments from outside the state, and that it excludes such charges arising without the state, even though connected with shipments originating in Minnesota. The claim is that services performed at Allouez Bay were of that character. Such earnings, in their very nature, are purely local. Switching and storage when not purely local are covered by the line haul tariff. If additional switching or storage, not contemplated in the car movement, is done, separate local

charges are made for that purely local service. Demurrage is obviously an earning growing out of a use of property which begins and ends when and where the delay occurs, and is not covered by the transportation charge. Switching, storage and demurrage are in no sense part of the transportation movement, but constitute a separate local service performed for the convenience of the consignee after the transportation movement has ended. What was done at Allouez Bay was covered by the charge for hauling ore; it was contemplated at the beginning of the movement and was necessary always to its completion. If the company had stored ore beyond the period allowed, or had done switching of an unusual or extraordinary nature in Wisconsin in respect of particular ore cars, or if through the fault of the shipper ore cars were held to the point of delay, resulting in extra charges, no part of the charges made therefor would have been included in the computation of the Minnesota tax. This argument ignores the facts.

Respectfully submitted,

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